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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**MOTION TO REQUIRE THE  
STATE TO ELECT WHICH  
PRONG OF THE (f)(6)  
AGGRAVATOR IT IS  
ALLEGING IN ADVANCE OF  
OCTOBER 20, 2009  
EVIDENTIARY HEARING ON  
PROBABLE CAUSE**

(Oral Argument and Evidentiary  
Hearing Requested)

Pursuant to Rules 5, 13.5, 15, and 16 of the Arizona Rules of Criminal  
Procedure, due process, and the Arizona and U.S. Constitution, Defendant Steven  
DeMocker requests that this Court direct the State to elect which prong of the (f)(6)  
aggravator it is alleging in advance of the October 20, 2009 evidentiary hearing on

1 probable cause as to the State's alleged aggravators. This Motion is supported by the  
2 following Memorandum and Points of Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Rule 5 of the Arizona Rules of Criminal Procedure requires the State to prove  
5 that probable cause exists as to the aggravating circumstances it has alleged in support  
6 of its notice of intent to seek the death penalty against Mr. DeMocker. *See* Ariz. R.  
7 Crim. P. 5.3(a). This Court has granted an evidentiary hearing to take place on October  
8 20, 2009 to address the probable cause of the alleged aggravating circumstances.

9 **BACKGROUND**

10 After remand, the grand jury indicted Mr. DeMocker on February 6, 2009 on one  
11 count of first degree murder and one count of aggravated burglary. Mr. DeMocker was  
12 arraigned on February 10, 2009. On June 29, 2009, 138 days after arraignment and 79  
13 days past the time permitted under Rule 15.1(i), the State amended its Notice of Intent  
14 to Seek the Death Penalty to add an alleged aggravating circumstance, §13-703(f)(6),<sup>1</sup>  
15 that the defendant committed the offense in an especially heinous, cruel or depraved  
16 manner.

17 **ARGUMENT**

18  
19 **I. The State Must Elect Which Prong of the (f)(6) Aggravating  
20 Circumstance it is Alleging Against Mr. DeMocker**

21 A.R.S. §13-703.01 (f)(6) provides that it is an aggravating circumstance if the  
22 defendant committed the offense in an especially heinous, cruel or depraved manner.  
23 A.R.S. § 13-703(f)(6). The State has not provided notice of which term of this  
24 disjunctive aggravating circumstance it is alleging. Without such an election, the  
25 aggravating circumstance is unconstitutionally vague, fails to provide Mr. DeMocker  
26 the required notice under the due process clause, and threatens a non-unanimous jury

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27 <sup>1</sup> Renumbered as A.R.S. § 13-751 (f)(6) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

1 verdict on an element or functional element of an offense in a capital case. This Court  
2 should require the State to identify which prong or prongs of this aggravating factor it is  
3 alleging in support of its notice of intent to seek the death penalty against Mr.  
4 DeMocker.

5 Allegation of an aggravating circumstance transforms a charge of first degree  
6 murder into the separate offense of capital murder. Therefore, Mr. DeMocker is entitled  
7 to a jury determination on the question of this aggravating circumstance. *See e.g.*  
8 *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348 (2000). A criminal  
9 defendant is entitled to “a jury determination that [he] is guilty of every element of the  
10 crime with which he is charged, beyond a reasonable doubt,” that “other than the fact of  
11 a prior conviction, any fact that increases the penalty for a crime beyond the prescribed  
12 statutory maximum must be submitted to a jury, and proved beyond a reasonable  
13 doubt.” *Id. See also Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

14 A jury must find an aggravating circumstance unanimously. A.R.S. § 13-703.01(E).  
15 *See also Anderson*, 210 Ariz. at 355, 111 P.3d at 397 (rejecting a jury finding of (f)(6)  
16 where the evidence was insufficient to support one or more of the alternative grounds).  
17 The Arizona Supreme Court has suggested that trial courts require juries to make  
18 separate findings as to each prong of the (f)(6) aggravator to avoid problems of  
19 potentially non-unanimous juries. *Id.*

20 Mr. DeMocker is also required to notice under the due process clause of the  
21 Fourteenth Amendment as to what aggravating circumstances are alleged. *See, e.g.,*  
22 *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, (2002) (noting, by comparison,  
23 that unlike the Fifth Amendment grand jury requirement which is inapplicable to the  
24 states, the Sixth Amendment notice requirement that defendants be informed of charges  
25 against them does apply to the states through the Fourteenth Amendment Due Process  
26 Clause).

1 In order to survive constitutional scrutiny for vagueness, each prong of this  
2 aggravating circumstance has been further defined by the Arizona Supreme Court.  
3 *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005).<sup>2</sup> Under *Anderson*, the State, to  
4 support a finding of probable cause for its allegation of either an “especially heinous” or  
5 “especially depraved” manner, must provide substantial evidence of the defendant’s  
6 “mental state and attitude at the time of the offense as reflected by his words and  
7 actions.” *Id.* at fn 19. In order to support a finding of heinousness or depravity, the  
8 State is required to show that the defendant exhibited such a mental state by one of the  
9 following acts – (1) “relishing” the murder, which must be shown by words or actions;  
10 or (2) inflicting gratuitous violence beyond that necessary to kill; or (3) needless  
11 mutilation. To support a finding of probable cause that the offense was committed in an  
12 “especially cruel” manner the State must provide substantial evidence of the victim’s  
13 mental state. “Cruelty requires proof that the victim ‘consciously experienced physical  
14 or mental pain prior to death and the defendant knew or should have known that  
15 suffering would occur.’” *State v. Newell*, 212 Ariz. 389, 406, 132 P.3d 833, 850 (2006)  
16 citing *State v. Trostle*, 191 Ariz. at 18, 951 P.2d at 883.

17 Because this is a capital case the United States Constitution requires that  
18 “extraordinary measures [be taken] to insure that the Accused ‘is afforded process that  
19 will guarantee, as much as is humanly possible, that [a sentence of death not be]  
20 imposed out of whim, passion, prejudice, or mistake.” *Caldwell v. Mississippi*, 472 U.S.  
21 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981)  
22 (O’Connor, J., concurring)). Indeed, “[t]ime and again the [Supreme] Court has  
23 condemned procedures in capital cases that might be completely acceptable in an  
24 ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v.*  
25 *Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and  
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27 <sup>2</sup> Counsel intends to file additional motions on the constitutionality of *Anderson* separately.

1 dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the  
2 Court's "duty to search for constitutional error with painstaking care is never more  
3 exacting than in a capital case.") (*quoting Burger v. Kemp*, 483 U.S. 776, 785 (1987)).  
4 This elevated level of due process applies both to the guilt and penalty phases of the  
5 case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).


6 Because the (f)(6) aggravator, without election of which prong the State is alleging,  
7 is unconstitutionally vague, fails to provide the required notice, and threatens a non-  
8 unanimous jury verdict in a death penalty case, the State should be required to elect  
9 which prong it is alleging in advance of the October 10, 2009 hearing on probable cause  
10 of the State's alleged aggravating circumstances.

#### 11 CONCLUSION

12 For these reasons, Mr. DeMocker requests that this Court direct the State to elect  
13 which prong or prongs of the (f)(6) aggravator it is alleging in advance of the October  
14 20, 2009 evidentiary hearing on probable cause of the State's alleged aggravators.

15 DATED this 6<sup>th</sup> day of October, 2009.

16  
17 By:

  
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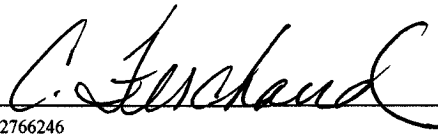
1 **ORIGINAL** of the foregoing mailed for filing  
2 this 6<sup>th</sup> day of October, 2009, with:

3 Jeanne Hicks  
4 Clerk of the Court  
5 Yavapai County Superior Court  
6 120 S. Cortez  
7 Prescott, AZ 86303

8 **COPIES** of the foregoing mailed  
9 this 6<sup>th</sup> day of October, 2009, to:

10 The Hon. Thomas B. Lindberg  
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